1-6-2016

State v. Weatherly Appellant's Reply Brief Dckt. 42777

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. TOBY GLENN WEATHERLY, Defendant-Appellant.	)	NO. 42777 NEZ PERCE COUNTY NO. CR 2014-4601 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

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STATEMENT OF THE CASE

Nature of the Case

A jury convicted Toby Weatherly of grand theft and possession of a financial transaction card, with a persistent violator sentencing enhancement. He received an aggregate unified sentence of five years, with one year fixed.

On appeal, Mr. Weatherly asserts his conviction and punishment for both the greater offense of grand theft of a financial transaction card and the lesser-included offense of possession of a financial transaction card, twice placed him in jeopardy for the same offense and, therefore, violated both the United States and Idaho Constitutions.

In response, the State argued that Mr. Weatherly's double jeopardy argument could not be reviewed as fundamental error because "it is not at all clear whether the 'pleading theory' even applies under the Idaho Constitution." This Reply Brief is necessary to address the State's claim.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Weatherly's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Was Mr. Weatherly twice placed in jeopardy for the same offense when he was convicted of and was sentenced for both the greater offense of grand theft of a financial transaction card and the lesser-included offense of possession of a financial transaction card?

ARGUMENT

Mr. Weatherly Was Twice Placed In Jeopardy For The Same Offense When He Was Convicted And Sentenced For Both The Greater Offense Of Grand Theft Of A Financial Transaction Card, And The Lesser-Included Offense Of Possession Of A Financial Transaction Card

Mr. Weatherly contends that his rights under the Double Jeopardy Clauses of the Idaho Constitution and the Fifth Amendment to the United States Constitution were violated when he was convicted and punished for the greater offense of grand theft of a financial transaction card, as well as the lesser-included offense of possession of a financial transaction card.

The State argues that Mr. Weatherly has failed to show fundamental error. The State misapplies the Idaho Supreme Court precedent governing double jeopardy and the pleading theory.

On appeal, Mr. Weatherly argued that under the "'pleading' theory, possession of a financial transaction card, as charged by the State, is a lesser included offense to grand theft of a financial transaction card." (Appellant's Brief, pp.11-13.) In response, relying on *State v. Corbus*, 151 Idaho 368 (Ct. App. 2011), the State argues that Mr. Weatherly has failed to show fundamental error "because it is not at all clear whether the 'pleading theory' even applies under the Idaho Constitution." (Respondent's Brief, pp.9-10.)

In *Corbus*, relying on *Stewart*[1], *Pizzuto*, and *Sivak*, the Idaho Court of Appeals found that "the available authority does not provide a clear answer to the question of

[1] The Court's reliance on *Stewart* is misplaced as the Idaho Supreme Court made it clear that the claim in *Stewart* was raised only under the Double Jeopardy clause of the United States Constitution. *State v. Stewart*, 149 Idaho 383, 386, 389-390 (2010).

which analytical theory should be applied in double jeopardy cases which allege a violation of the Double Jeopardy Clause of the Idaho Constitution."[2] *Corbus*, 151 Idaho at 374. The *Corbus* Court is mistaken in its application of the applicable case law and ignores *State v. Curtis*, 130 Idaho 522, 524 (1996).

In *Sivak*, the Court was asked to determine whether Sivak's robbery conviction merged into his felony murder conviction thereby violating Sivak's double jeopardy protections. *State v. Sivak*, 112 Idaho 197, 205-206 (1986). The *Sivak* Court specifically acknowledged that in addition to the statutory theory, Idaho has adopted "the broader indictment or pleading theory." *Id.* at 206. The Court continued, "[t]his theory holds 'that an offense is an included offense if it is alleged in the information as a means or element of the commission of the higher offense.'" *Id.* (quoting *State v. Anderson*, 82 Idaho 293, 301 (1960).) The *Sivak* Court cautioned that under the pleading theory, "*the issue is analyzed in reference to the facts of each case.*" *Id.* The Court noted that it would reach the same conclusion under the statutory test or the pleading theory. *Id.* at 211 n.8. Then in *Pizzuto*, the Idaho Supreme Court again addressed the claim to whether robbery was the lesser included offense of felony murder. *Id. State v. Pizzuto,* 119 Idaho 742, 756-757 (1991). Relying extensively on *Sivak*, the *Pizzuto* Court again found a double jeopardy violation under both the Idaho Constitution and the United States Constitution. *Id.* at 758. The Court implied that it would reach the same conclusion applying either the statutory test or pleading theory. *Id.*

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[2] *Sivak v. State*, 112 Idaho 197 (1986); *State v. Pizzuto*, 119 Idaho 742 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425 (1991); *State v. Stewart*, 149 Idaho 383 (2010).

While the *Corbus* Court cites both *Pizzuto* and *Sivak* for the proposition that they created a different standard of review under the pleading theory, it is clear, as set forth above, that both cases apply the same pleading test that was previously articulated in *State v. Thompson*, 101 Idaho 430, 433 (1980). Moreover, in each case, the Idaho Supreme Court concluded that the appellant was entitled to relief under either theory. Even if *Sivak* and *Pizzuto* somehow articulated a different analysis under the pleading theory, they were overruled in 1997 by *Curtis, supra*, which was not cited by the Court of Appeals in *Corbus.* In *Curtis*, this Court reiterated that:

> There are two theories under which a particular offense may be determined to be a lesser included offense of a charged offense. Under the first theory, a court will determine whether a crime is a lesser included offense by first looking to the statute defining the crime and ascertaining if the matter urged as a lesser included offense is one that is necessarily included in that crime which is defined in the particular statute. This theory has been referred to as the "statutory theory."
>
> . . .
>
> Under the second theory a court will look to see if the information (complaint) charges the accused with a crime the proof of which necessarily includes the proof of the acts which constitute the lesser included offense. This theory is referred to as the "pleading theory."

Curtis, 130 Idaho at 524 (internal citations omitted); s*ee also State v. Flegel*, 151 Idaho 525 (2011) (applying the pleading theory and holding that sexual abuse of a minor is not a lesser included offense of lewd conduct because it was not alleged that he committed the crime of sex abuse as a means of committing lewd conduct). In the instant case, Mr. Weatherly asserts, as alleged in the charging documents, the crime of possession of a financial transaction card is a lesser included offense to grand theft by use of a financial transaction card. This is so because the factual predicate for the commission of both offenses was the same. That is, Mr. Weatherly's possession of the card was the factual means by which he committed the offense of grand theft by use of a financial

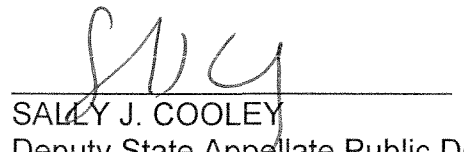
transaction card. Having a card in his possession was necessary to before Mr. Weatherly could take money or property by using the card. Mr. Weatherly's possession of a financial transaction card was the means of committing the offense of grand theft by use of a financial transaction card.

The State concedes that Mr. Weatherly's "argument that one cannot steal a financial transaction card without possessing it, and that criminal possession of a financial transaction card is thus a lesser included offense of grand theft," may be a plausible argument, had it been raised below. (Respondent's Brief, p.8.) The State claims that Mr. Weatherly cannot show "plain error" due to the lack of precedent—that there are no Idaho appellate court decisions in which the court specifically considered the issue. (Respondent's Brief, p.8.) The State claims that, because there is no Idaho case law in which an appellate court considered the issue of whether grand theft of a financial transaction card constitutes criminal possession of a financial transaction card, Mr. Weatherly cannot show plain error. (Respondent's Brief, p.8.) The State references *Corbus* in support of this proposition; however, *Corbus* does not stand for this proposition and is distinguishable because the *Corbus* Court, when analyzing the defendant's claim that he had been subjected to multiple convictions and punishments under the Idaho Constitution, relied on federal law and referenced multiple federal cases in which there was a circuit split as to the legal issue; thus, the law was not clear for that reason. *Corbus*, 151 Idaho at 372. Such is not the case here as Mr. Weatherly's claim is capable of review and determination based on the statutes and pleadings.

CONCLUSION

Mr. Weatherly respectfully requests that this Court vacate his convictions and remand for a new trial.

DATED this 6th day of January, 2016.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of January, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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